89- 1573

NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

STATE OF ALABAMA,

PETITIONER,

V.

WALTER RAYBON MCDANIEL,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA AND APPENDIX

OF

DON SIEGELMAN
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL

Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

QUESTIONS PRESENTED

1. Where an officer has probable cause to believe that a party is committing a felony in a vehicle and is armed and, on such basis makes a lawful custodial arrest of such person, is the officer authorized to search such person and to seize any contraband revealed by such search?

2. Should this Honorable Court exercise its supervisory jurisdiction over U. S. Constitutional claims to set aside the obvious misapplications of the provisions of the Federal Constitution in this case?

THE PARTIES

In the Circuit Court of Houston County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Walter Raybon McDaniel, who is Respondent herein, as Defendant, Appellant and Respondent, respectively, and the State of Alabama, who is Petitioner herein, as Plaintiff, Appellee, and Petitioner, respectively.

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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

STATE OF ALABAMA,

PETITIONER,

V.

WALTER RAYBON MCDANIEL,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

OPINIONS AND ORDERS BELOW

The opinion, issued by the Court of Criminal Appeals of Alabama on September 29, 1989, reversing Respondent McDaniel's conviction and remanding the cause, because allegedly illegally seized evidence was introduced in his trial, is not yet reported, but will be reported as:

McDaniels v. State ___ So.2d.___ (Ala. Crim. App, 1989)

A copy of the same is submitted as Appendix "A" to this petition.

The order of the Supreme Court of Alabama of January 26, 1990, denying, without opinion, Your Petitioner State's Petition for a writ of certiorari is not yet reported but will be reported as a part of the above report. A copy of said order is submitted as Appendix "B" to this Petition.

The Alabama Courts have declined to issue a stay in this cause.

JURISDICTION

The order of the Supreme Court of Alabama was issued on January 26, 1990, and this petition is filed within ninety (90) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Court of Criminal Appeals of Alabama claimed that its decision was mandated by the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Your Petitioner is making a claim under the same said provisions. Said constitutional provisions read:

"AMENDMENT IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"AMENDMENT XIV

"Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

No statutory provisions are at issue in this proceeding. Respondent McDaniel was convicted under Section 20-2-70(a), Code of Alabama, 1975. A copy of the same is submitted as Appendix "C" to this petition.

STATEMENT OF THE CASE

The Respondent, Walter Raybon McDaniel, was indicted for possession of a controlled substance, (See Appendix "C"), namely, the administratively scheduled drug Diazepan, by the Grand Jury of Houston County, Alabama, at its February, 1987, Term. (R.pp.158-159) On March 4, 1987, the Respondent was arraigned on the indictment and pleaded not guilty. (R.p.163)

On March 12, 1987, the Respondent moved to suppress the evidence found and seized as a result of an allegedly illegal custodial arrest. The motion read:

> "Comes now, the Defendant in the above styled cause, and moves this Honorable Court to suppress the evidence seized as a result of an illegal arrest and search as neither were based on probable cause, warrant, or consent on the date seized." (R.p.164; emphasis supplied)

On March 21, 1988, the cause came on for trial before Honorable Michael A. Crespi, a Circuit Judge, and a jury. The Respondent was attended by his Attorney, Honorable John T. Kirk, a highly respected criminal defense specialist, and the State was represented by its District Attorney, Honorable Douglas A. Valeska. Before trial, the jury was excluded, and the Court took up the Respondent's motion to suppress and heard evidence thereon.

The evidence showed without conflict that Houston County Deputy Sheriff Joe Watson stopped the Respondent's truck after receiving two telephone calls from a confidential informer, who had been giving him accurate information on numerous occasions over some seven years and another call from a good citizen, who on a previous occasion had given him accurate information. Both persons independently gave Deputy Watson detailed information on the Respondent, his truck, his

companions, where the truck would be, that the Respondent had pounds of marijuana in his possession and was armed. After verifying much of the information he had received by personal observation, Deputy Watson stopped the Respondent's truck, took the Respondent into custody[1] and searched him. The search revealed a bottle of pills. (R.pp.3-52) On hearing the evidence and the argument of counsel, Judge Crespi overruled the motion to suppress. (R.p.52)

The Respondent was ultimately convicted in a bench trial. (R.pp.58-147) On April 15, 1988, the Respondent was sentenced to thirty years imprisonment and a fine of $50,000.00, because of his two prior felony convictions relating to controlled substances. (R.pp.151-154)

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1. There was never any claim or suggestion that the Deputy intended to make or made an investigatory stop.

Appeal to the Court of Criminal Appeals of Alabama followed.

On September 29, 1989, the Court of Criminal Appeals of Alabama reversed the Respondent's conviction, because, although the officers had probable cause to search the Respondent's truck, the search went beyond that authorized in an investigative stop and there were allegedly no exigent circumstances excusing the obtaining of a warrant. (Appendix "A") The court concluded:

> "...As a result of the unlawful seizure, evidence of the pills was received into evidence in violation of the United States Constitution. We have no choice, therefore, but to revese and remand this case for further proceedings not inconsistent with this opinion...." (See Appendix "A", page 37; emphasis supplied.)

On October 13, 1989, the State applied for rehearing and asked the Court of Appeals to find additional facts. However, on November 17, 1989, the same was overruled without further comment.

The State petitioned the Supreme Court of Alabama for a writ of Certiorari to review the Court of Appeals' decision and opinion, pointing out that the same were in patent conflict with the Fourth Amendment as interpreted by this Honorable Court, as well as its own prior decisions and opinions relative to custodial arrest, searches incident thereto and the authority of this Honorable Court. However, on January 26, 1990,the Alabama Supreme Court declined to review the Court of Appeals' opinion without comment. (Appendix "B")

STATEMENT OF THE FACTS

The following facts were proven without conflict at the suppression hearing.

On December 13, 1986, Deputy Joe Watson of the Houston County Sheriff's Office received a telephone call from a confidential informer who had been providing accurate

information to Watson for some seven (7) years. (R.pp.8-9, 17-22, and 40-41) This informer's information had led to numerous arrests and several convictions. (R.pp. 17-21) The information was to the effect that the Respondent was coming to a certain used car lot in Dothan, Houston County, Alabama. (R.pp. 29-30) A description of the Respondent and his truck was given. (R.pp. 24-25) The informer told Deputy Hudson that the Respondent was in possession of "pounds of marijuana" (R.pp. 14 and 27), and that the Respondent was armed. (R.pp.14) The confidential informer stated that he had seen the marijuana on the Respondent's truck. (R.p. 27)

A short time later, Mrs. Charmane Graves also called Deputy Watson. Deputy Watson had also had previous experience with Mrs. Graves. She had reported a burglary and provided information which led to the arrest

and conviction of the perpetrator. (R.pp. 46-48) Mrs. Graves independently corroborated the confidential informer's information, and added that the Respondent would be accompanied by his nephew and her daughter. She also provided the truck's tag number. (R.pp. 15, 22-23, 27, 30, and 37-39)

Within a half hour of his or her first call, the confidential informer called back to reconfirm the earlier information and add thereto. (R.p. 14-15, 23-25, and 39-40)

Deputy Watson and Officer Ladon Joiner located the Respondent at the place predicted by the informer and Mrs. Graves. Everything was as they had predicted, except that Mrs. Graves' daughter had been dropped off. The officers could not see the bed of the truck. (R.p.12) Officer Joiner stopped the Respondent's truck, and Deputy Watson told the Respondent that he was suspected of possession of marijuana and asked the Respondent to get

out of the vehicle. In patting down the Respondent, Deputy Watson felt and heard what he took to be a bottle of marijuana seeds in one of the Respondent's pockets. However, they turned out to be a bottle of pills. The Respondent was handcuffed, Mirandized, and put in a police vehicle. (R.pp.9-13, 25-27, 33-36, and 41-43)

The time between the confidential informer's first call and the arrest was less than one hour. (R.pp.27-28)

We will not burden the Court with a detailed recitation of the evidence at trial, but two matters were proven at trial, which throw some light on the search and seizure issue:

First, Mrs. Graves' daughter, Lori Ann Lang, testified for the Defense, (R.pp. 96-119), inter alia (1) that she had been with the Respondent prior to the stop, just as Mrs. Graves had told Deputy Watson, but she had

been dropped off, and (2) that the Respondent had been in possession of a quantity of marijuana, as both informers told Watson, but it was abandoned before the stop.

Second, the Respondent's nephew, Frank Campbell, also testified for the Defense (R.pp. 119-133), that there was a firearm in the vehicle, just as the confidential informer had said, and that he, Campbell was trying to load it at the time of the stop.

SUMMARY OF THE ARGUMENT

I. Every action by Deputy Watson in this case was justified by two independent factors. Contrary to the holding of the Court of Criminal Appeals (Appendix "A", page 36), the shortness of time and the involvement of a vehicle separately excused the lack of a warrant. E.g. United States v. Johns, 469 U.S. 478, 483ff, 83 L.Ed.2d 890, 896 ff, 105 S.Ct. 881 (1985). The only issue raised by the outstanding counsel who represented the

Respondent at trial and on appeal was the alleged lack of probable cause, but Deputy Watson had obvious probable cause from two independent sources, and the state courts actually found that Watson had probable cause. The search of the Respondent's person, which was condemned by the Alabama Appellate Courts, was justified because: (1) The Respondent was found in a vehicle and the probable cause related a commodity and a weapon which could be concealed on the person. United States v. Ross, 456 U.S. 798, 801 and 866 ff, 72 L.Ed.2d 572, 578 and 589ff, 102 S.Ct. 2157 (1982). And, (2) on the basis of probable cause, Watson lawfully placed the Respondent under custodial arrest (Berkemer v. McCarty, 468 U.S. 420, 437 ff, 82 L.Ed.2d 317, 333 ff, 104 S.Ct. 3138 [1984]), and a lawful custodial arrest authorizes a search of the arrestee's person. United States v. Robinson, 414 U.S. 218, 224 ff, 38 L.Ed.2d 427, 434 ff, 94 S.Ct. 467 (1973); Gustofson v. Florida, 414

U.S. 260, 265 ff, 38 L.Ed.2d 456, 461 ff, 94 S.Ct. 488 (1973).

II. This Honorable Court should exercise its supervisory authority in this case because: (A) The great principals established by this Court governing arrests and searches ought not be disregarded by State Courts. (B) Unless this Court's authoritative interpretations of the Constitution are uniformly followed by State Courts, the Constitution will receive freakish application. (C) If the opinion of the Alabama Court of Appeals in this case stands, it will discourage citizens like Mrs. Graves from reporting crime. And, (D) if evidence found in patently legal searches is suppressed under the Fourth Amendment Exclusionary Rule, the Rule will be stripped of the deterrent effect, which is the only purpose of the Rule:

ARGUMENT

I.

REASON FOR GRANTING THE WRIT: OBVIOUS CONFLICT WITH THE OPINIONS OF THIS HONORABLE COURT.

We must first apologize to this Honorable Court for burdening the Court with a simple case involving an obvious point. However, for reasons we set out below, we believe that as officers of this Court we are obliged to call this case to the Court's attention. Specifically, we believe that this is a case which cries out for the exercise of this Honorable Court's supervisory authority.

An analysis of his case reveals what could be called a case of "mixed doubles", since every action taken by the officers was authorized by two independent factors. There were <u>two</u> exigent circumstances dispensing with a warrant, <u>two</u> sources of information, each independently providing probable cause, and <u>two</u> independent justifications for the search of the Respondent's person, which produced the

evidence and which the Alabama Appellate Courts found to have been in violation of the Fourth Amendment. Thus, what this case presents is a very obvious departure from this Court's teachings.

The Court of Criminal Appeals of Alabama found that, "...[t]here were no exigent circumstances excusing the obtaining of a warrant...." (Appendix "A", page 36)

Under the teachings of this Honorable Court, the warrant requirement was excused by reason of two exigent circumstances: (1) The shortness of time, less than one hour from the first contact of the informer, and (2) independ- ently, by the fact that a vehicle was involved. United States v. Johns, 469 U.S. 478, 483 ff, 83 L.Ed.2d 890, 896 ff, 105 S.Ct. 881 (1985); United States v. Ross, 456 U.S. 798, 72 L.Ed.2d 572, 483 ff, 102 S.Ct. 2157 (1982); Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970); Carroll v. United States, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925).

The only issue argued by the Respondent in his state court appeal was a claim that there was not sufficient probable cause to authorize a custodial arrest. But, the Deputy had information from two independent sources. First, a confidential proven informer of many years standing provided detailed information, including the fact that he, the informer, had actually seen the marijuana on the Respondent's truck. This information would have provided probable cause even under the strict standard of Aguilar v. Texas (378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 [1964]).[2] This probable cause was strengthened when the Respondent appeared at the place and in the manner predicted by the informer. See Illinois v. Gates, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983). Second, Mrs.

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2. See Illinois v. Gates, 462 U.S. 213, 238, 76 L.Ed.2d 527, 548, 103 S.Ct. 2317 (1983) and Massachusetts v. Upton, 466 U.S. 727, 732, 80 L.Ed.2d 721, 726, 104 S.Ct. 2855 (1984).

Graves, a good citizen, independently gave Deputy Watson detailed information on the Respondent, his truck, itinerary, companions and the contraband. Officers have never been required to have prior experience of reliability with regard to citizen witnesses, (E.g. United States v. Fooladi, 703 F.2d 180, 182-183 [5th Cir, 1983]), but Mrs. Graves had established a good "track record" for reliability, and her information was coorborated by the officers' observations just before the stop. The Court of Criminal Appeals found that there was probable cause "to search the truck". This was, of course, true, but the fact is that there was probable cause to believe that the Respondent was committing a felony and was armed, and this authorized not only a search of the vehicle, but also the search of the Respondent and his custodial arrest.

The search of the Respondent's person was authorized by two independent factors:

First, since the probable cause related a firearm and a contraband commodity, the Respondent's pockets were obviously containers in which a gun and/or a portion of the contraband could be concealed. United States v. Ross, 456 U.S. 798, 866 ff, 72 L.Ed.2d 572, 689 ff, 102 S.Ct. 2157 (1982). Indeed, in Ross (456 U.S. 798, 801, 72 L.Ed.2d 572, 578) the propriety of the search of Ross at the time of the stop was taken for granted. The second factor independently authorizing the search of the Respondent's person was the custodial arrest of the Respondent. The fact that Deputy Watson had probable cause to believe that the Respondent was committing a felony[3], authorized a custodial arrest.

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3. §13A-1-2. DEFINITIONS.

> "Unless different meanings are expressly specified in subsequent provisions of this title, the following terms have the following meanings: ...
>
> "(4) FELONY, An offense for which a sentence to a term of imprisonment in excess of one year is authorized by this title...." (Code of Alabama, 1975)

Carroll v. United States, 267 U.S. 132, 156, 69 L.Ed. 543, 553, 45 S.Ct. 280 (1925)[4]; Section 15-10-3(a)(4), Code of Alabama, 1975[5]. Deputy Watson stopped the Respondent, told him that he was suspected of possession of marijuana, asked the Respondent to get out of his truck, searched him, Mirandized him and handcuffed him. Obviously,

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4. "...The usual rule is a police officer may arrest without warrant one believed by the officer, upon reasonable cause, to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeantor if committed in his presence...." (267 U.S. 132, 156, 69 L.Ed. 543, 553)

5. "§15-10-3. ARREST WITHOUT WARRANT - WHEN AND FOR WHAT ALLOWED; WRITTEN REPORT OF FAMILY VIOLENCE REGARDLESS OF ARREST.

"(a) An officer may arrest any person without a warrant, on any day and at any time for: ....

"(4) When he has reasonable cause to believe that the person arrested has committed a felony, although it may afterwards appear that a felony had not in fact been committed...." (Code of Alabama, 1975)

neither the Respondent nor any reasonable person would have had any expectation that he would be released shortly at the scene. Nothing in Deputy Watson's actions suggested to the Respondent any probability of being released, except on bond after being booked into the county jail. This was, therefore, a custodial arrest. See Justice Marshall's very clear analysis of the difference between custodial and non-custodial arrest in Berkemer v. McCarty, (468 U.S. 420, 437 ff, 82 L.Ed.2d 317, 333 ff, 104 S.Ct. 3138 [1984]). Since it was authorized by probable cause, this was a lawful custodial arrest. It is hornbook law that a lawful custodial arrest authorizes a full search of the arrestee's person for weapons and evidence. United States v. Robinson, 414 U.S. 218, 224 ff, 38 L.Ed.2d 427, 434 ff, 94 S.Ct. 467 (1973); Gustafson v. Florida, 414 U.S. 260, 38 L.Ed.2d 456, 94 S.Ct. 488 (1973). Thus, Deputy Watson's

search of the Respondent and seizure of the contraband were lawful.

II.

REASONS WHY THIS HONORABLE COURT SHOULD EXERCISE ITS SUPERVISION AUTHORITY.

It is obvious that Deputy Watson acted properly and that the Alabama Appellate Courts erred to reversal in holding otherwise, but should this Honorable Court act in this case? We respectfully submit that the Court should for four reasons:

Fist, as is apparent from our analysis above, this Honorable Court has spent considerable effort over many decades to establish the clear principles controlling the arrest-search situation, which protect the citizen from unreasonable police intrusion, while guaranteeing that the police have sufficient authority to protect the citizen from general lawlessness and themselves from

violent attack. These principles were followed in letter and in spirit by Deputy Watson in this case and grossly misapplied by the Court of Criminal Appeals of Alabama, as shown on the face of the Courts of Appeals' opinion. Obviously, if this Court's efforts are not to be wasted, the lower courts must follow the principles established at so much cost to this Honorable Court. And, such courts must be made aware that the constitutional principles established by this Court are not mere suggestions.

Second, if the Constitution is to accomplish the great tasks set for it by "We the People", in the preamble, it must be uniformly applicable in all cases throughout the nation. This Honorable Court is charged with providing uniformly applicable interpretations of the provisions of the Constitution. If lower courts disregard this Honorable Court's interpretations, then the Constitution will receive only freakish application.

In this case a good citizen, doing her civic duty, reported the Respondent, and thus exposed herself. We do not represent to this Court that the Respondent has threatened Mrs. Graves, nonetheless, his return to her community will certainly not be a comfort to Mrs. Graves or encourage her or others to provide information to the police. And, how do we explain to Mrs. Graves and her fellow citizens why the Respondent's conviction was set aside? It certainly would not be truthful to say that the fault lies with Mrs. Graves or Deputy Watson.

On finding what it held to be a violation of the Fourth Amendment, the Court of Criminal Appeals ordered the evidence suppressed, under the Fourth Amendment Exclusionary Rule. The Exclusionary Rule has been developed by this Honorable Court as a means of protecting Fourth Amendment rights. The Rule is based on the, no doubt correct,

assumption that granting largesse to guilty persons whose rights are violated will deter such violations of the rights of innocent people. However, for any penalty to deter violation of a rule, those subject to the rule must believe that they are in control of the infliction of the penalty, i.e, that if they violate the rule they will certainly suffer the penalty and if they obey the rule they will surely avoid the penalty. If those subject to a rule ever come to believe that the penalty may be inflicted or withheld unpredictably no matter how careful they are about obeying the rule or flagrant they are in violating it, deterrence will fail. Indeed, a freakishly administered penalty may even encourage violations of the rule.

It must be acknowledged that there are close cases, where there is legitimate controversy over whether or not there was a violation. However, the instant case is not

by any standard a close case. We began our argument with a detailed analysis of the simple facts of this case and how the well-established principles of law apply to them. The only argument the outstanding Attorneys who represented the Respondent at trial and on appeal could advance for their client was a claim that Deputy Watson did not have probable cause, but even Court of Criminal Appeals found that there was probable cause. The decision and opinion of the State courts in this case sends an unmistakable message to Alabama law enforcement officers: No matter how careful you are about obeying the Constitution and no matter how many independent justifications for your action you establish, we may suppress the evidence anyway.

This Honorable Court should grant the writ and determine if this is a proper application of the Fourth Amendment Exclusionary Rule.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that in this case the Court of Criminal Appeals and Supreme Court of Alabama, decided simple questions under the Fourth Amendment in a manner which is in patent and flagrant conflict with the teachings of this Honorable Court.

Therefore, Your Petitioner prays that this Honorable Court will issue the writ of certiorari and will review the matters complained of and reverse the decisions and opinion of the said Appellate Courts of Alabama.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY:

_____

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR THE Petitioner

APPENDIX

APPENDIX A

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1988-89

4 Div. 143

Walter Raybon McDaniel

v.

State

Appeal from Houston Circuit Court

TAYLOR, PRESIDING JUDGE

The appellant, Walter Raybon McDaniel, was convicted of possession of drugs, a violation of §20-2-70, Code of Alabama 1975. He was sentenced to 30 years' imprisonment and was ordered to pay a $50,000 fine.

The state's evidence tended to show that on December 13, 1989, Deputy Watson received information from two informants, one of whom was a confidential informant, that the appellant had several pounds of marijuana in

his truck. The confidential informant told Watson that he had seen the marijuana in the appellant's truck. He also told Watson that the appellant would have a weapon in his possession. Another informant, Mrs. Graves, contacted Watson and verified the information provided by the confidential informant. She also said that her daughter and nephew would be with the appellant. Approximately 45 minutes after Watson's call from the confidential informant, two officers stopped the appellant without a warrant. As they approached the truck, they saw a rifle through the back window of the truck. They patted him down and searched the truck. No marijuana was discovered in the truck. However, during the search of the appellant's person, Diazepam pills were found in a brown glass bottle in the appellant's pocket. Diazepam, a common tranquilizer, is a controlled substance. Mrs. Graves' daughter stated that the pills

belonged to her. On appeal, appellant challenges the legality of the search.

I.

Initially appellant contends that the officer conducted an illegal search and, thus, that evidence of the pills discovered pursuant to that search was the fruit of an unlawful search and seizure and was due to be suppressed.

According to well established legal principles, searches conducted with no warrant are per se "unreasonable," unless they fall under one of the exceptions to the warrant requirement. See Brannan v. State, [Ms. 1 Div. 509, February 24, 1989] ___ So.2d ___ (Ala. Cr. App. 1989).

The exceptions are:

> "(1) in plain view; (2) with consent voluntarily, intelligently and knowingly given; (3) as incident to lawful arrest; (4) in 'hot pursuit' or emergency situation; (5) where exigent

> circumstances exist coincidentally with probable cause; and (6) in 'stop and frisk' situations."

Smith v. State, 472 So.2d 677, 682 (Ala. Cr. App. 1984).

As Judge McMillan stated in Kinard v. State, 495 So.2d 705 (Ala. Cr. App. 1986):

> "Probable cause exists when the reasonably reliable information known to the officers is sufficient to cause the officers to entertain a strong suspicion that the object of the search is in the particular place to be searched."

495 So.2d at 709.

Probable cause based on information from an informant should meet the test of reliability. See Waters v. State, 360 So.2d 347 (Ala. Cr. App.), writ denied, 360 So.2d 358 (Ala. 1978). Two relevant considerations in the determination of the reliability of an informant are basis of knowledge and credibility of the informant. See Stanfield v. State, 529 So.2d 1053 (Ala. Cr. App. 1988). In the instant case, Deputy Watson

testified that the confidential informant had proven reliable over the past 7 years. He named several cases which the informant had "made" for him. The informant had also stated that he had observed the marijuana personally. The state proved this informant's reliability.

As mentioned above, in addition to that informant's information, a Mrs. Graves had also called the police. Deputy Watson stated that he was familiar with Mrs. Graves because she had reported a burglary several months earlier, which led to the arrest of an individual. "The veracity of the 'citizen informant' is easily established for 'the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case.'" Crawley v. State, 440 So.2d 1148, 1149 (Ala. Cr. App. 1983).

We conclude that there was sufficient probable cause in this case to search the truck.

With regard to the body search of the appellant, we note that Deputy Watson testified that he had had information from the confidential informant that the appellant would have a weapon in his possession.

> "Terry [v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)] authorized a limited protection search for concealed weapons (a frisk) '[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others.' 392 U.S. at 24. 'So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose.' Adams [v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) ... at 146. Section 15-5-31, Code of Alabama 1975, authorizes a search for weapons if the officer 'reasonably suspects that he is in danger of life or limb' when he has properly stopped a person for questioning."

Crawley, 440 So.2d at 1150.

In this case, the officer "patted down" the appellant because he had a reasonable suspicion that the appellant was armed, based upon the informant's statement. See, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). However, as stated above, this type of search must be very limited in scope. It is abundantly clear in this case that this was not a Terry stop and patdown. In this case, the police officer testified that he had searched the appellant for marijuana. Deputy Watson further testified that he knew when he touched the pill bottle that it was not a weapon. Deputy Watson was not justified, under Terry, in performing such an intrusive search. The officer's concern was to discover marijuana. Seizure of the pill bottle was not lawful. There was no warrant. There were no exigent circumstances excusing obtaining a warrant. The officer did not seize the bottle

in an attempt to protect himself. As a result of the unlawful seizure, evidence of the pills was received into evidence in violation of the United States Constitution. We have no choice, therefore, but to reverse and remand this case for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

ALL THE JUDGES CONCUR.

APPENDIX B

ORDER OF THE SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

January 26, 1990

89-305

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Walter Raybon McDaniel v. State)

(CCA 4/143 Houston CC 87-106)

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

SHORES, J. _Hornsby, Cj., Jones, Houston and Kennedy, JJ., concur

APPENDIX C

RELEVENT ALABAMA STATUTES

Code of Alabama, 1975

Title 20

§ 20-2-70. PROHIBITED ACTS A.

(a) Except as authorized by this chapter, any person who possesses, sells, furnishes, gives away, obtains or attempts to obtain by fraud, deceit, misrepresentation or subterfuge or by the forgery or alteration of a prescription or written order or by the concealment of a material fact or by use of false name or giving a false address controlled substances enumerated in schedules I, II, III, IV and V is guilty of a felony and, upon conviction, for the first offense may be imprisoned for not less than two nor more than 15 years and, in addition, may be fined not more than $25,000.00; provided, that any person who possesses any marihuana for his personal use only is guilty of a misdemeanor and upon conviction for the offense, shall be

imprisoned in the county jail for not more than one eyar, and in addition, shall be fined not more than $1,000.00; provided further, that the penalties for the subsequent offenses relating to possession of marihuana shall be the same as specified in the first sentence of this subsection.

§20-2-76. PENALTIES FOR SECOND OR SUBSEQUENT OFFENSES; WHEN OFFENSE DEEMED SECOND OR SUBSEQUENT OFFENSE.

(a) Any person convicted of a second or subsequent offense under this chapter may be imrpisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized or both.

(b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this chapter or under any

statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant or hallucinogenic drugs. (Acts 1971, No. 1407, p. 2378, § 407.)

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of March, 1989, I did serve the requisite number of copies of the forgoing on the Attorney* and former Attorney** for Walter Raybon McDaniel, Respondent, by mailing the same to said Attorneys, first class postage prepaid and addressed as follows:

Hon. Jeffery C. Duffey*
Attorney at Law
600 McDonough Street
Montgomery, AL 36104

Hon. John T. Kirk**
Attorney at Law
Post Office Box 1412
Montgomery, AL 36100

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
Alabama State House
11 North Union Street
Montgomery, Alabama 36130
(205) 242-7300

1912P

(2)

NO. 89-1573

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF ALABAMA,

PETITIONER

V.

WALTER RAYBON MCDANIEL,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA
AND
THE COURT OF CRIMINAL APPEALS OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION

JEFFERY C. DUFFEY
ATTORNEY FOR RESPONDENT
600 S. MCDONOUGH STREET
MONTGOMERY, AL 36104
205/834-4100

QUESTIONS PRESENTED

1. In a situation where an officer receives information from a confidential informant that several pounds of marijuana is contained in a vehicle, subsequently stops the vehicle one hour later, conducts a pat down search of the driver for weapons and feels in the driver's pocket a small closed opaque container that the officer knows was not a weapon, which is then seized and opened to reveal pills, and then places the driver under arrest for possession of controlled substances (pills), searches the vehicle and discovers that the vehicle contains no marijuana, the arrest, search, and seizure of the person is in violation of the Fourth and Fourteenth Amendments of the United

States Constitution.

2. This Court should not exercise its supervisory jurisdiction over the application of the Federal Constitution in this case where the facts were in dispute, it is not an issue of great public interest, nor is a novel or important principle at issue.

PARTIES

1. The caption in this case contains the names of all parties.

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NO. 89-1573

IN THE SUPREME COURT OF THE UNITED STATES

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OPINION BELOW

The opinion, issued by the Court of Criminal Appeals of Alabama on September 29, 1989, reversing Respondent's conviction because of illegally seized evidence is reported as: McDaniel v. State, 555 So.2d 1145 (Ala.Crim.App.

1989), cert. den., 1990 Ala. LEXIS 67 (Jan. 26, 1990). A copy of the same is submitted as Appendix "A" to this petition.

The Alabama Courts have declined to issue a stay in this cause.

The opinion issued by the Alabama Court of Criminal Appeals contains the following factual errors: (1.) The date of the incident is listed as December 13, 1989. 555 So.2d at 1146. (page 22 of this response). The correct date is December 13, 1986. (R-9). (2.) The opinion states that the defendant was stopped approximately 45 minutes after the deputy received the call from the confidential informant. 555 So.2d at 1146. (page 23 of this response). The testimony on a number of occasions was that the time elapsed was one hour and was stated at one time to be a minimum of

fifty minutes. (R-23, 29; Sup. R-15, 54). (3.) The opinion states that as the officers approached the defendant's truck "they saw a rifle through the back window of the truck." 555 So.2d at 1146. (page 23 of this response). The rifle was actually behind the seat in a zipped-up, opaque bag and not visible without looking behind the seat. (R-32, 33, 77, 120). (4.) The opinion states that Mrs. Graves had reported a burglary "several months earlier" to Deputy Watson. 555 So.2d at 1147. (page 26 of this response). Actually Mrs. Graves had reported the burglary more than a year prior to this offense. (R-47).

JURISDICTION

The Petitioner's Statement of Jurisdiction is correct, except that the correct citation for the statute is 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent relies on the same constitutional provisions cited by the Petitioner which are:

AMENDMENT IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV
Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of laws."

STATUTORY PROVISIONS INVOLVED

The statement by Petitioner as to statutory provisions is correct.

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

On December 13, 1986, Respondent was arrested after a warrantless search and seizure for possession of a controlled substance, i.e., Diazepam. (R9) (Sup.R-14, 27, 28). Respondent was subsequently indicted by the February 1987 term of the Houston County, Alabama Grand Jury for possession of Diazepam. (R158). On March 12, 1987, Respondent filed a Motion to Suppress based on an illegal arrest, search, and seizure. (R164).

On March 21, 1988, Respondent's Motion to Suppress was denied and he was convicted of the crime charged. On April 15, 1988, Respondent was sentenced to 30

years imprisonment and a fine of $50,000.00. (R-154).

On September 29, 1989, the Alabama Court of Criminal Appeals reversed the conviction of Respondent stating that the evidence was seized as a result of an unlawful seizure in violation of the United States Constitution. On November 17, 1989, the Alabama Court of Criminal Appeals denied without comment the Petitioner's Application for Rehearing. On January 26, 1990, the Alabama Supreme Court denied the Petition for Writ of Certiorari without comment. 555 So.2d 1145.

Respondent had been incarcerated in the Alabama Prison System since March 21, 1988. The Petitioner applied to the Alabama Court of Criminal Appeals and the Alabama Supreme Court for a stay of its opinion pending a Petition for Writ of

Certiorari being filed in the United States Supreme Court. Both courts denied the stay and Respondent has now been released on bond pending the outcome of this Petition.

FACTUAL BACKGROUND

Although the Petitioner states the evidence was without conflict, Respondent represents that the evidence was in great conflict. Because the evidence was in conflict and because of errors claimed in the opinion of the Court of Criminal Appeals, Respondent makes the following statement of facts.

On December 13, 1986, Deputy Joe Watson received a telephone call from a confidential informant. This informant had given Watson information in the past over a period of approximately four to five years on approximately seven cases, some of which led to arrests and some of

which led to convictions. (R-17, 40). The confidential informant told Watson that ten minutes prior to this telephone call, he had seen numerous pounds of marijuana in a vehicle, a truck. He described the vehicle, but stated he did not know where the vehicle was at the time. Deputy Watson told the informant to find out where the truck was and call him back. Watson didn't recall if this informant stated whether anybody was with the person in the vehicle. (Sup.R-16, 17, 19). There was no description given of the Respondent. There was no statement that Respondent was coming to a certain used car lot in Dothan, Alabama. Deputy Watson stated he had information that the Respondent had a weapon but not specifically what kind of weapon. (R-14).

About 30 minutes after Watson

received the call from the informant, Mrs. Charmane Graves called Deputy Watson. Mrs. Graves had provided information to him about a burglary one to two years previous. (R-47). At one hearing, Deputy Watson testified that he could not remember if Mrs. Graves gave him a description of the truck. (Sup.R-23). Deputy Watson testified on a different date that she did describe the truck and stated marijuana was in the truck, provided the tag number for the truck, and where the truck was going to be. (R-27).

Deputy Watson testified he thought Mrs. Graves was crazy and that she was hysterical. (Sup.R-22, 23; R-23). The information from Mrs. Graves was that her daughter and Respondent's nephew were in the vehicle and that Mrs. Graves had had a fight with Respondent. (R-38, 39).

Deputy Watson testified on May 15, 1987, that the first confidential informant was supposed to call him back and tell him the location of Respondent, and that the confidential informant did not call Deputy Watson back until after Deputy Watson had already stopped, arrested, and taken Respondent to jail. (Sup.R-12, 19, 20, 50). Deputy Watson then testified on March 21, 1988, that the first confidential informant returned the call prior to Deputy Watson stopping the Respondent and while Deputy Watson was in his police vehicle. This call was on Deputy Watson's beeper, lasted approximately fifteen seconds and gave the location of the Respondent. (R-14, 15, 23-25, 39-40).

Approximately one hour after Deputy Watson received the first call or from when the confidential informant said he

first saw the pounds of marijuana, Respondent was stopped by Deputy Watson and another officer. (Sup.R-11, 54). Contrary to the assertion by Petitioner, everything was not as the informants had predicted. There was no marijuana in the car, not even a seed and there was no female in the car. (Sup.R-29; R-41).

When Deputy Watson stopped the Respondent, he advised the Respondent that he was suspected of having marijuana in the vehicle and that Deputy Watson was about to make a search of the vehicle. (R-12). Deputy Watson had to ask for identification and inquire of the two occupants of the vehicle as to which was Respondent. Watson had no prior personal contact with the Respondent. (R-69).

The Respondent was not under arrest at the time of the stop and Deputy Watson

proceeded to check or pat down Respondent for weapons. (R-31; Sup.R-14, 27, 28). Respondent was not under arrest at the time of the pat down. (R-31). Deputy Watson found the bottle of pills when he was checking the person of Respondent for weapons. (Sup.R-27, 28). Watson knew the bottle was not a weapon when he patted Respondent down. The bottle was in Respondent's pocket. (R-25, 37). Respondent had no gun, had made no threats to Watson and did not resist. (R-26). Watson could not see through the bottle and opened the bottle to discover seventeen pills. Although the pills contained no name and no recognizable numbers, Watson testified he identified the pills as being Valium. (R-34, 35, 233). Watson could not state beyond a shadow of a doubt what the pills were but he "knew" what the pills were. (R-36).

No field test was conducted. (R-37). Watson arrested Respondent after the pills were discovered. (Sup.R-14). Deputy Watson testified that he took a class in college in pharmacology and therefore knew what the pills were. He then testified that he checked the PDR in his office after the arrest and the pills were not listed in the PDR. He then took the pills to the Southeast Alabama Medical Center Pharmacy where the pills were identified as generic valium. (R-74).

Deputy Watson did not have a warrant nor did he personally observe any criminal activity prior to stopping Respondent. (R-10).

A rifle was in the Respondent's vehicle but was behind the seat in a closed, zippered bag that could not be seen through. The rifle could not be

viewed without opening the car doors if it was behind the seat. (R-32). In fact the other deputy had to ask the other occupant of the vehicle where the rifle was and found it behind the seat. (R-120, 123). Contrary to the statement by Petitioner, the other occupant of Respondent's vehicle was not trying to load the rifle at the time of the stop. There was an empty shell on the floorboard. There was a clip in the glove compartment. He was going to put the empty shell in the clip. (R-123).

Deputy Watson's search of the vehicle failed to reveal any marijuana, not even a seed. No one else was arrested. (Sup.R-29).

SUMMARY OF THE ARGUMENT

I.

Contrary to the assertion by Petitioner, the excluded evidence was not

seized pursuant to a lawful custodial arrest, but was done during a pat down for weapons search. Respondent was then placed under arrest after the pat down. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

II.

This Court should not exercise its supervisory authority in this case because of the great conflict in the facts.

ARGUMENT

I.
REASON FOR NOT GRANTING THE WRIT: THERE IS NO CONFLICT WITH THE OPINIONS OF THIS HONORABLE COURT

Contrary to the assertions of the Petitioner, Deputy Watson intended to make or made an investigatory stop in this case. Watson stopped the

Respondent, informed him he was suspected of having marijuana in the vehicle and that Watson intended to make a search. Watson then, by his own admission, prior to making any arrest, patted down the Respondent for weapons. During the pat down, Watson discovered the closed pill bottle, opened it and subsequently arrested Respondent for the pills. No marijuana was found in the vehicle or on Respondent's person, not even a seed. There is nothing contrary to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) or Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

The information in this case from the confidential informant was that several pounds of marijuana were in the truck. There was no information that any marijuana was on the person of the

Respondent or that he was in possession of pills. It is obvious that the Respondent could not have pounds of marijuana in a pill bottle on his person. The information also was that Respondent had a rifle. Respondent obviously did not have the rifle on his person.

Petitioner's assertion that Deputy Watson had probable cause to believe that Respondent was committing a felony, therefore authorizing a custodial arrest is an incorrect statement as applied to the facts of this case. If that were true, Deputy Watson would have immediately arrested Respondent upon the stop rather than telling him he was a suspect and then not arresting him until after a pat down for weapons was made. It cannot be suggested that based on the information from the confidential informants that Deputy Watson could have

made a lawful arrest of Respondent strictly on that information after stopping Respondent and not finding any contraband in the vehicle. But for the pills, there would have been no arrest. If this were true, every search based on probable cause or search warrant would result in arrest of parties present even though no contraband is found. In other words, there would never be a differentiation between probable cause to search and probable cause to arrest. In any event, it is uncontradicted that the officer did not make the arrest until after the pat down for weapons when the pills were seized. Therefore, the Petitioner cannot assert that Respondent was searched and a seizure occurred based on an arrest.

II.

REASONS WHY THIS COURT SHOULD NOT EXERCISE ITS SUPERVISORY AUTHORITY

The Alabama Court of Criminal Appeals has not misapplied the law in this case. That Court has followed the principles established by the Constitution and decisions of the United States Supreme Court.

This is a case involving contested factual issues and the decision of the court of last resort on these issues should stand. This is not an issue of great public interest or a novel or important principle handed down by the Alabama Appellate Courts.

The facts in this case are not as simple as Petitioner states and it is a close call on the facts.

Mrs. Graves had motive to mislead Deputy Watson because she was mad at Respondent for dating her daughter. She was acting "crazy" when she called Watson.

The Respondent has already served two years in prison on this charge. Respondent was not released to the same community as Mrs. Graves and does not even live in the same county that she does.

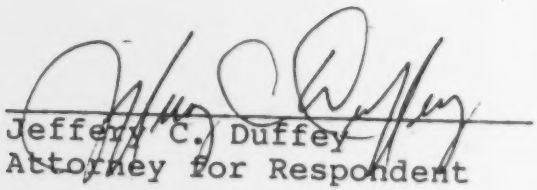
Based on the facts of this case, there is no unmistakable bad message being sent to law enforcement.

CONCLUSION

In conclusion, Respondent respectfully submits that the decisions of the Alabama Court of Criminal Appeals and of the Alabama Supreme Court are correct in this case. Therefore, Respondent requests that this Court deny

the Petition for Writ of Certiorari.

Respectfully submitted,



Jeffery C. Duffey
Attorney for Respondent

APPENDIX A

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1989

4 Div. 143

Walter Raybon McDaniel

v.

State

Appeal from Houstin Circuit Court

TAYLOR, PRESIDING JUDGE

The appellant, Walter Raybon McDaniel, was convicted of possession of drugs, a violation of [Section] 20-2-70, Code of Alabama 1975. He was sentenced to 30 years' imprisonment and was ordered to pay a $50,000 fine.

The state's evidence tended to show that on December 13, 1989, Deputy Watson received information from two informants, one of whom was a confidential informant,

that the appellant had several pounds of marijuana in his truck. The confidential informant told Watson that he had seen the marijuana in the appellant's truck. He also told Watson that the appellant would have a weapon in his possession. Another informant, Mrs. Graves, contacted Watson and verified the information provided by the confidential informant. She also said that her daughter and nephew would be with the appellant. Approximately 45 minutes after Watson's call from the confidential informant, two officers stopped the appellant without a warrant. As they approached the truck, they saw a rifle through the back window of the truck. They patted him down and searched the truck. No marijuana was discovered in the truck. However, during the search of appellant's person, Diazepam pills were found in a brown

glass bottle in the appellant's pocket. Diazepam, a common tranquilizer, is a controlled substance. Mrs. Graves' daughter stated that the pills belonged to her. On appeal, appellant challenges the legality of the search.

I.

Initially appellant contends that the officer conducted an illegal search and, thus, that evidence of the pills discovered pursuant to that search was the fruit of an unlawful search and seizure and was due to be suppressed.

According to well established legal principles, searches conducted with no warrant are per se "unreasonable," unless they fall under one of the exceptions to the warrant requirement. See Brannan v. State, [Ms. 1 Div. 509, February 24, 1989] ___ So.2d ___ (Ala.Cr.App. 1989).

The exceptions are:

> "(1) in plain view; (2) with consent voluntarily, intelligently and knowingly given; (3) as incident to lawful arrest; (4) in 'hot pursuit' or emergency situation; (5) where exigent circumstances exist coincidentally with probable cause; and (6) in 'stop and frisk' situations."

Smith v. State, 472 So.2d 677, 682 (Ala.Cr.App. 1984).

As Judge McMillan stated in Kinard v. State, 495 So.2d 705 (Ala.Cr.App. 1986):

> "Probable cause exists when the reasonably reliable information known to the officers is sufficient to cause the officers to entertain a strong suspicion that the object of the search is in the particular place to be searched."

495 So.2d at 709.

Probable cause based on information from an informant should meet the test of reliability. See Waters v. State, 360 So.2d 347 (Ala.Cr.App), writ denied, 360

So.2d 358 (Ala. 1978). Two relevant considerations in the determination of the reliability of an informant are basis of knowledge and credibility of the informant. See Stanfield v. State, 529 So.2d 1053 (Ala.Cr.App. 1988). In the instant case, Deputy Watson testified that the confidential informant had proven reliable over the past 7 years. He named several cases which the informant had "made" for him. The informant had also stated that he had observed the marijuana personally. The state proved this informant's reliability.

As mentioned above, in addition to that informant's information, a Mrs. Graves had also called the police. Deputy Watson stated that he was familiar with Mrs. Graves because she had reported a burglary several months earler, which

led to the arrest of an individual. "The veracity of the 'citizen informant' is easily established for 'the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case.'" Crawley v. State, 440 So.2d 1148, 1149 (Ala.Cr.App. 1983).

We conclude that there was sufficient probable cause in this case to search the truck.

With regard to the body search of the appellant, we note that Deputy Watson testified that he had had information from the confidential informant that the appellant would have a weapon in his possession.

> "Terry [v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)] authorized a limited protection search for concealed weapons (a frisk) '[w]hen an

> officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others.' 392 U.S. at 24. 'So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose.' Adams [v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)]...at 146. Section 15-5-31, Code of Alabama 1975, authorizes a search for weapons if the officer 'reasonably suspects that he is in danger of life or limb' when he has properly stopped a person for questioning."

Crawley, 440 So.2d at 1150.

In this case, the officer "patted down" the appellant because he had a reasonable suspicion that the appellant was armed, based upon the informant's statement. See, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). However, as stated above, this type of search must be very limited in

scope. It is abundantly clear in this case that this was not a Terry stop and patdown. In this case, the police officer testified that he had searched the appellant for marijuana. Deputy Watson further testified that he knew when he touched the pill bottle it was not a weapon. Deputy Watson was not justified, under Terry, in performing such an intrusive search. The officer's concern was to discover marijuana. Seizure of the pill bottle was not lawful. There was no warrant. There were no exigent circumstances excusing obtaining a warrant. The officer did not seize the bottle in an attempt to protect himself. As a result of the unlawful seizure, evidence of the pills was received into evidence in violation of the United States Constitution. We have no choice, therefore, but to reverse and

remand this case for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

ALL THE JUDGES CONCUR.

CERTIFICATE OF SERVICE

I, Jeffery C. Duffey, a member of the Bar of the Supreme Court of the United States and attorney for Respondent, hereby certify that on this 28TH day of JUNE, 1990, I placed the foregoing response in the United States Mail, First Class, Postage Prepaid, to Honorable Joseph F. Spaniol, Jr., Clerk, United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543, and I served the correct number of copies of the foregoing response to Petition for Writ of Certiorari on Honorable Joseph G.L. Marston, III, Assistant Attorney General of Alabama, at the Alabama Statehouse, 11 S. Union Street, Montgomery, AL 36130, by First Class Postage Prepaid.

Attorney for Respondent

NO. 89-1573

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

STATE OF ALABAMA,

PETITIONER,

V.

WALTER RAYBON MCDANIEL,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION

OF

DON SIEGELMAN
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL

Office of the Attorney General
Alabama State House
11 South Union Street
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(205) 242-7300

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TABLE OF CASES

TABLE OF CONSTITUTIONAL PROVISIONS

REPLY TO THE RESPONDENT'S STATEMENT OF THE FACTS

The Petition is based on the undisputed facts shown by the record and found by the Court of Criminal Appeals of Alabama. The Respondent takes issue with the findings of the Court of Appeals on numerous points, but none of these is of any substantive significance in relation to the matters raised by the petition. For this reason, we will not burden the Court with a discussion of them.

However, on one point we must take issue with the Respondent. The Respondent writes:

> "...Deputy Watson testified he thought Mrs. Graves was crazy and that the was hysterical. (Sup.R-22, 23; R-23)...."
> (Opposition Brief, page 9)

Watson testified that this was his initial impression of Mrs. Graves, because she was upset. Watson testified:

"Q. And, did you deem her, in your mind, that she was crazy? Is that correct?

"A. When I first heard her start, when she started jabbering on, I thought who is this crazy woman calling me. That was my first thought." (R.p. 23; emphasis supplied)

And:

"Q. Do you remember testifying at the preliminary hearing where we said, did you have the lady call and at first you thought she was crazy?

"A. Absolutely. [Witness laughing.] I'm still not so sure she's not." (Supp.R.p. 22; emphasis supplied.)

And:

"A. No, sir. I remember that what I said was -- I said she called and when she first called, the way she was raving, I thought she was crazy.

"Q. Okay.

"A. And then when she started giving me the same information that I already had and she told me where he was going, then I acted. Because she told me where the fellow had just left there and was in route to Smith's Used Cars." (Supp.R, p.23; emphasis supplied.)

REPLY ARGUMENT

I.

CUSTODIAL ARREST

The Respondent argues that the search of the Respondent was illegal, since the Deputy intended to make an investigative stop and did not make an arrest until after the search. But, Watson never testified that such was his intention, and a police officer's intentions are not controlling on the question of custodial arrest. And, there is, of course, no ritual of arrest.

The Alabama Court of Criminal Appeals found that Watson had probable cause, therefore, a custodial arrest was authorized. It is undisputed that Watson stopped the Respondent, made him alight from his truck, told him he was suspected[1] of carrying

---

1. In Glass v. State (424 So.2d 687, 688-689 [Ala. Crim. App, 1982]), the Court of Criminal Appeals ruled that a person who was stopped, ordered out of a vehicle, and told he was suspected of a felony, was under custodial arrest.

marijuana, and searched him[2]. Any reasonable person so treated would understand that he would not be allowed to go shortly. A person so treated would, therefore, be under custodial arrest, even if the officer did not so intend. Berkemer v. McCarty, 468 U.S. 420, 437 ff, 82 L.Ed.2d 317, 333 ff, 104 S.Ct. 3138 (1984). Watson took the Respondent into custody, and this was lawful, since it was based on probable cause.

2. The Respondent claims that Watson "patted the Respondent down", but the whole rationale of the Court of Appeals' opinion and decision is that Watson went further than a "pat down".

II.

FACTUAL DISPUTES AND SUPERVISION

The Respondent claims that there are factual disputes in this case, but none of those to which he points, including Mrs. Graves' sanity, are of any significance. The only serious factual issue, from the beginning, was probable cause, and the State Courts found that against the Respondent. Interestingly, this is one issue which the Respondent does not raise here.

In this case the Alabama Appellate Courts trampled on at least a century of constitutional precedents, suppressed the evidence, and ordered a drug offender re-tried, this being tantamount to acquitting him. It is most difficult to see how the Respondent can claim that this case is of so little public concern that this Honorable Court should leave it undisturbed.

CONCLUSION

In conclusion, your Petitioner, the State of Alabama, again respectfully submits that in this case the Court of Criminal Appeals and Supreme Court of Alabama, decided questions under the Fourth Amendment in a manner which is in patent and flagrant conflict with the teachings of this Honorable Court.

Therefore, your Petitioner prays that this Honorable Court will issue the writ of certiorari and will review the matters complained of and reverse the decisions and opinion of the said Appellate Courts of Alabama.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY:

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR THE PETITIONER

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of July, 1990, I did serve the requisite number of copies of the forgoing on the Attorney* and former Attorney** for Walter Raybon McDaniel, Respondent, by mailing the same to said Attorneys, first class postage prepaid and addressed as follows:

Hon. Jeffery C. Duffey*
Attorney at Law
600 McDonough Street
Montgomery, AL 36104

Hon. John T. Kirk**
Attorney at Law
Post Office Box 1412
Montgomery, AL 36100

_____

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL
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2161P